No. 216.
Reply Br. of Plff. in Err.
FILED
APR 7 1900
JAMES H. MCKENNEY,
Filed April 7, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 216.

HENRY P. CLARKE, PLAINTIFF IN ERROR,

vs.

NANCY B. CLARKE AND OTHERS.

BRIEF IN REPLY FOR THE PLAINTIFF IN ERROR.

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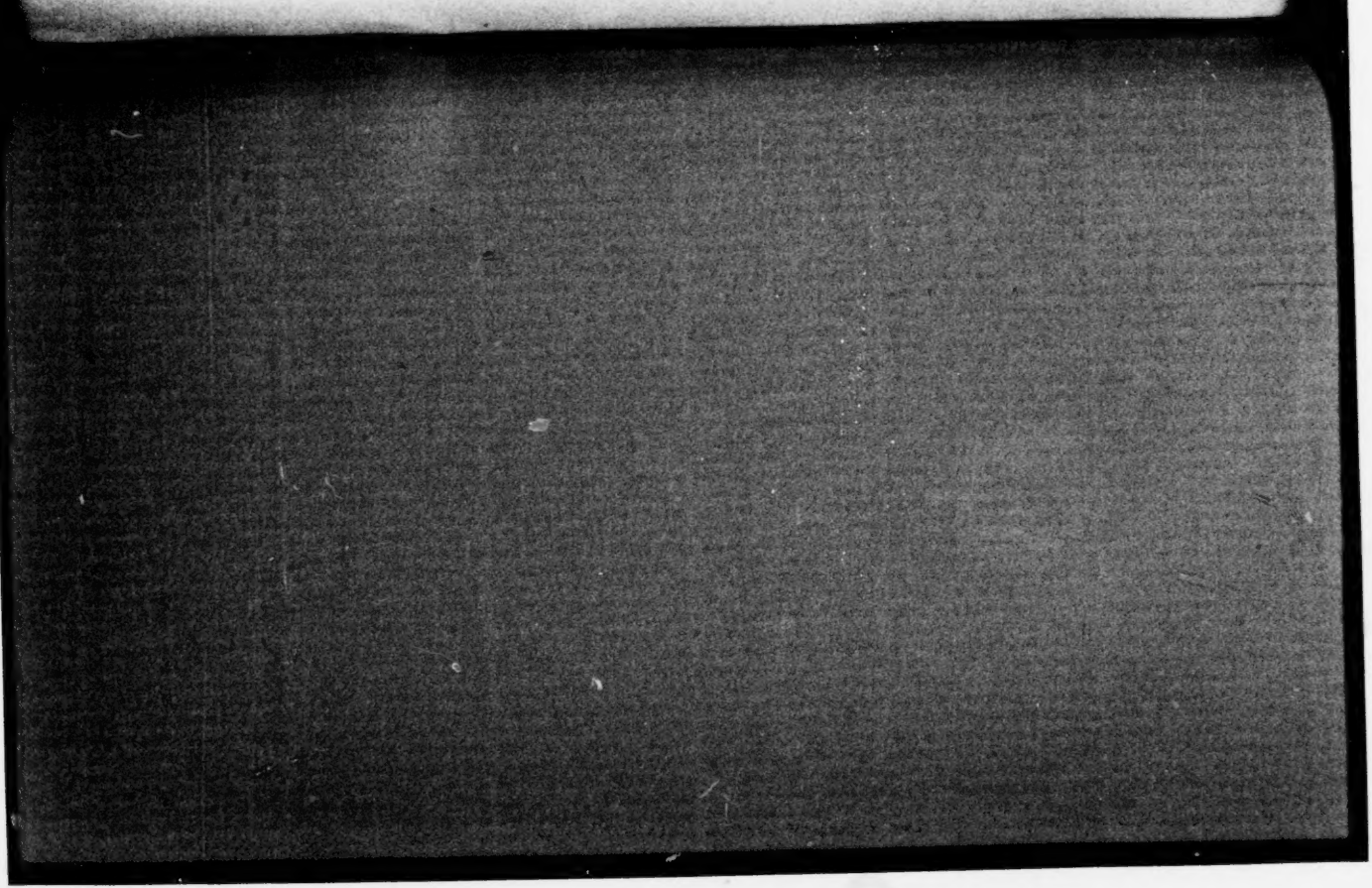
APRIL 4, 1900.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-7-1900



IN THE

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Brief in Reply for the Plaintiff in Error.

The record shows, that upon a proceeding for distribution in the year 1897, in a court of probate of the State of Connecticut, a question arose whether a certain interest in land lying in that State, (which had been disposed of by a South Carolina will then before the court,) was realty or personalty, and that it was adjudged to be realty, pp. 6–8; that thereupon a party in interest was allowed to appeal to the proper superior court, p. 9; and that in that court, p. 44, as well as upon further appeal, in the supreme court, p. 46, the judgment in probate was *affirmed;* and further, pp. 19–22, that upon the present writ of error to the latter *the* federal

question presented is, whether by a *finding* made in the course of coming to that judgment the supreme court of Connecticut had given due faith and credit to a previous decree of the supreme court of South Carolina, (see record:—p. 36, "14," and also Brief of Messrs. Youmans & Verner, *App.*,) by which it had been held that because of the effect of a certain South Carolina will, such property had equitably been converted into *personalty*.

The jurisdiction of courts of probate in Connecticut extends to orders for sale of the real estate of deceased persons, for distribution or division amongst the parties entitled thereto, "in the same manner as if such real estate had not been sold." And upon appeals from any such order the superior court, in addition to the functions of the court below, exercises in general its own special powers as a court of equity. "General Statutes of Conn., 1888," sec. 600, as construed in Buel's Appeal, 60 Conn. Report, 63; Chamberlin's Appeal, 70 *Ib.*, 363; and Mark's Appeal, 71 *Ib.*, 122.

The form of application to the probate court was that "Henry P. Clarke," of South Carolina, having been appointed Connecticut administrator of his deceased child Julia, filed a petition in that character for the distribution of her Connecticut estate, whereupon the court held that such estate was *realty*; and that, inasmuch as Julia had died without brothers or sisters excepting one, *i. e.*, "Nancy B. Clarke," the latter only was entitled thereto. After this Henry P. Clarke, in his personal capacity, was allowed to

appeal; Nancy B. Clarke also being a party, and John H. Perry, Esq., her guardian *ad litem*.

In the superior court all of the facts were found and spread upon the record, p. 13, as a foundation for application to the supreme court for "advice." Upon consideration of these the supreme court gave its advice to affirm the judgment in probate—which was done; and an appeal taken thereafter, *ex abundanti*, to the supreme court from the decree so rendered—and upon affirmance of this, the present writ of error was sued out.

The finding of the supreme court of Connecticut, that the record of the South Carolina judgment created no *res judicata*, between the parties before it, was placed upon two grounds: (1), that the decree shown thereby had not been betwixt the same parties; and (2), that the construction by such decree of the will referred to was not competent as to such part of the realty disposed of thereby as lay in Connecticut.

To consider the above points in order.

1. The suit in equity in South Carolina had been brought by *Henry P. Clarke* as "executor" and "trustee," and not expressly in his personal capacity, the defendant thereto being *Nancy B. Clarke*,—and its object was to obtain the advice of the court upon the duty of the plaintiff as trustee for the defendant, in regard to lands lying in South Carolina, Connecticut, New York and Kansas, which his wife,—

the testatrix,—had directed to be equally divided betwixt him, and two young daughters,—he being also appointed guardian and trustee for the latter until they should attain twenty-five years of age,—one of such children, viz., *Julia*, having died soon after the death of the mother, at the age of five months,—so that, whether her interest in her mother's estate were realty or personalty, the whole of it was represented by one or both of the parties to the suit.

Under the authorities cited upon the point as to *parties* in the principal brief for the plaintiff in error,—as well as by the reason of the thing, we submit that it is plain that in applying to a court for its advice about the meaning of a testamentary provision for partition of property, which operated *as a unit* upon him as trustee and also in his personal capacity, Henry P. Clarke was bound by the advice given,—*in both capacities*. This is shown by "*the object of the judgment*," as said in Morton *vs.* Packwood, 3 La. Ann., 167; and is illustrated by Corcoran *vs.* Chesapeake Co., 94 U. S., 741; and, *incisively*, in Fouché *vs.* Harrison, 78 Ga., 359. See also Tilly *vs.* Tilly, 2 Bl. Ch. (*Md.*), 436.

2. We submit that consideration of the material features of the South Carolina decree shows that this should have been allowed operation as *res judicata* by the supreme court of Connecticut.

For, the land devised by the testatrix became the subject of equitable conversion not because of the South Carolina decree, but because of the South Carolina will: And whether the South Carolina court understood this, upon the face of the matter, or

by interpretation, or by construction,—raises no constitutional question as to the fact. The circumstances that under the same will the land was also affected by *a trust*, and that the trustee applied to a court of equity to define his duties thereabouts, and further, that as an incident to such advice the court declared that the land had been equitably converted into personalty;—and moreover that the Constitution of the United States superinduced upon such advice *conclusiveness for all that it contains,— as to all parties thereto,*—are circumstances merely collateral to the matter of the advice in question. The testatrix had a right to make a testamentary disposition (the proper formalities being observed) of her real property lying in Connecticut; and also to modify that disposition, viz:—to create situations in point of fact for that land and its owners by any provisions whatever that were allowable by the laws of that State. *Equitable conversion* is a sort of status as well known to Connecticut courts of equity, as to such courts elsewhere. We say "status,"—*process* might be better; for really it is a mere *fiction* in equitable procedure, "a working theory," that serves, in its place, purposes not dissimilar to those which *John Doe, Scintilla Juris, Express Color*, &c., have ministered to, elsewhere, in their day.

Accordingly it is also *transient*,—continuing, at farthest, only,—where *testamentary*, from the death of the testator to the time when conversion shall have become perfect, and the interest one of the sort intended,—for all purposes and all persons, *as well at law*, as in equity; and it is not only transient, but it exists, so far as it does at all, only in regard to those persons who accept the beneficial interest to which it is incident. In the present case the Connecticut "land,"

for instance, is nothing but land for all purposes in regard to that State as ultimate proprietary, (viz: for all purposes of taxation, &c., and for those of police or the like: as, it is interesting to observe, Lord Hardwicke said expressly as regarded *The Crown*, in Penn *vs.* Lord Baltimore,—) and also indeed as to the whole world excepting Mr. Clarke and his daughter Nancy; and no less as to the latter persons, *except in equity*.

It seems well to look the thing in the face.

The duties in that respect imposed upon Mr. Clarke are imposed upon him not as executor but as trustee. The duties of a trustee once accepted attend his person—(unlike in this to those of executors and administrators—,) *without reference to geographical boundaries or to those of sovereignties*,—into all lands whose tribunals respect the principles of modern European law. Decisions in relation to foreign executors and administrators, as such, therefore are not applicable to the present case, for these savor of *local acts of court*, in *Probates* and *Letters*.

The South Carolina court did not decide whether the personal duty whose existence it declared, was one that devolved entirely upon Henry P. Clarke, or, (because of the situation created by the will) extended also to his daughter Nancy. It declared (1), the existence of an equitable conversion, but did not say *how* or *where* this bit of machinery should effect its object; adding, in substance, only, (2), that the *proceeds* of such *effect*, in whatever way properly accomplished,—should be received by the executor and accounted for accordingly. Inasmuch as the South Carolina court, as is usual in such cases, *retained* the Clarke will for *further directions*, we submit that it is obvious that its decree has

established no detail of subsidiary proceeding, except that any such must tend to effect the object of the will as declared, *i. e., conversion.* In other respects it amounts merely to the old commercial expression, "*Do the needful*": whether *in pais* or in courts of Connecticut, or elsewhere, or however else,—and report here from time to time for approval and further directions! And so the trustee seems to have understood it,—for he soon applied to a court of Connecticut, *in part performance.*

We submit that a South Carolina court is far within the verge of its right when giving advice to a South Carolina trustee as regards a South Carolina trust in matters that, as here, he might perform within South Carolina; and that if by reason of infancy or other collateral circumstance, such advice requires the parties to resort to a foreign court for assistance in such duty, that is not an element to be considered *in the present connection.* The S. C. decree is advice to any party before it subject to the *duty* declared thereby, whether *expressly* or *impliedly*;—leaving *details* of compliance to their own prudence. It is advice, as usual, of the most general sort. And it is advice that might have been effectively obeyed by deeds *in pais*, executed at the very *situs* (?) of such advice,—in the court-room itself, if the parties advised had been *sui juris*; and moreover, it is advice that, under presumptions proper in that case, meant that it should be obeyed by proper subsidiary applications within any State or country where the trust property lay, *if necessary*: the details of such obedience to be thereafter from time to time reported to itself for approval, or correction.

In case Mr. Clarke whilst physically within South Car-

olina could, had he been absolute owner in fee-simple, have conveyed this land by an ordinary deed of proper form for Connecticut, the additional circumstance that a South Carolina court had declared it to be his *duty to some one* to make such conveyance, would have been no obstruction to the validity of the latter. A trustee having a fee-simple has as much power at law to convey the land as if he were not trustee. The only discount upon such validity is in his relation of *trust*. But that incident is not important here, for it would attend equally upon a deed made by a Connecticut trustee. It will be a singular thing if the circumstance upon which Lord Hardwicke fastened to define the competency of action in cases like the present, viz., the existence of *a trust*, should in the same connection be an obstruction. And it is not so. The question here is not as to validity under the law of trusts, but under interstate relation,—*i. e.*, one preliminary to any scanning of trust relations:—violation of the latter being in the meantime also not to be anticipated in the further progress of the matter in the South Carolina court—and indeed no suggestion thereof has been made.

And this is so equally as to incidents arising from the infancy of the defendant Nancy. The principle in regard to possible offence to Connecticut, is to be tested by putting a case upon the same facts, betwixt parties *sui juris*.

Finally, modern authorities do not carry the principle of the matter beyond,—or in any way materially vary from, the principle laid down in Penn *vs.* Lord Baltimore, 1st Vesey, 444; 2 Lead. Cases in Eq., 308; *i. e.*, that *personal duty* in regard to matters of property, *whether executory*, as in contract and trust; or where *broken* as in fraud; may in the former be enforced, or, in the latter, redressed, in equity,

without regard to the situs of any realty involved therein. The American authorities collected in the principal brief for the plaintiff in error, make this proposition good, and these authorities are in accord with the rule laid down in late English text-books of very high character.

For instance, Mr. Dicey's "*Rule*," is as follows: Conflict of Laws, pp. 214–219:

"Subject to the exception hereinafter mentioned the court [of chancery] has no jurisdiction to entertain an action for the determination of the title to, or the right to the possession of, any immovable situate out of England: (foreign land). * * *

"*Exception*.—The court has jurisdiction to entertain action against a person who is in England respecting an immovable situate out of England: (foreign land),—on the ground of either, (*a*) a contract between the parties to the action, or, (*b*) an equity between such parties: with reference to such immovable."

And in Lewin on Trusts, p. [48] the following language occurs:

"How far equitable interests may be engrafted on *foreign* property requires consideration. As regards *movable* estate there is no difficulty," &c., &c.

"As to *lands* lying in a foreign country the court will enforce *natural* equities, and compel the specific performance of contracts, provided the *parties* be within the jurisdiction, and there be no insuperable obstacle to the execution of the decree."

We may be allowed at this point to introduce a recent decision in Virginia which quotes instructive language

from a judge of the highest character amongst those of the Revolutionary period,—*Chancellor Wythe*:—to the whole of whose opinion, as cited hereinafter, we also refer as perhaps the earliest authority upon the present topic to be found in our reports. We may also add "without prejudice" that a biography of the chancellor, prefixed to his Reports, informs the reader that in politics he was "*a Jeffersonian*;" and it is common learning that in 1794, the date of the opinion, politics were warm in Virginia, and things ripening towards the "Resolutions of 1798." His short method with the objection of "State sovereignty" in a case substantially that now before the court, and as well also, that of Penn, &c. (not alluded to by him),—some 44 years older,—should be reassuring in the year 1900.

Hotchkiss *vs.* Middlekamp, 96 Va., 649 (January, 1899):

There, H. H., a woman residing in New York, and owning land in Virginia, had in the year 1836 been adjudged a lunatic by a court of chancery of the former State; and a committee appointed for her by the same court had been authorized to sell the land, which he did, and executed a deed therefor in conformity with the order: no other title being given.

A suit in equity to quiet title having been filed some sixty years afterwards by the persons who then claimed through such deed,—in the course of its judgment thereupon the Supreme Court said:

"It is settled law that real estate is exclusively subject to the laws and jurisdiction of the courts of the nation or state in which it is located. No other laws or courts can affect it. * * * It is true that in cases of fraud, trust and

contract courts of equity will, wherever jurisdiction over the parties has been acquired, administer full relief without regard to the nature or situation of the property in which the controversy had its origin; and even where the relief sought consists in a decree for the conveyance of property which lies beyond the control of the court,—provided it can be reached by the exercise of its powers over the person, and the relief asked be of such a nature as the court is capable of administering (Wimer *vs.* Wimer, 82 Va., 890, and authorities there cited).

"Between these two propositions there is not the slightest conflict. The decree of the court does not operate *ex proprio vigore* in the foreign state or territory, but having jurisdiction over the person, it will in cases of fraud, trust, or contract compel the party within its jurisdiction to obey its decree. As was said by Chancellor Wythe in Farley *vs.* Shippen, Wythe's Reports, 135. 'If an act performed by a party in Virginia who ought to perform it, will be effectual to convey land in North Carolina, why may not a court of equity in Virginia decree that party—regularly brought before that tribunal—to perform that act. Some of the defendant's counsel supposed that such a decree would be deemed by our brethren of North Carolina an invasion of their sovereignty. This shall be allowed the force of a good objection if those who urge it will prove that the sovereignty of that State will be violated by the Virginia court of equity decreeing a party within its jurisdiction, to perform an act there, which act voluntarily performed anywhere would not be such violation.'

"In the last clause above quoted is to be found the very kernel of the matter. * * * If *H. H.* had been of sound mind, and had voluntarily conveyed the property in question, it would have been an act valid everywhere. So if as a result of contract, trust, or fraud she had been under obligation to convey this property, the court of New York, having jurisdiction over her, could have compelled obedi-

ence to its decree, and that act which she could have performed voluntarily would have been equally valid though done under the compulsion of a foreign decree.

"But here we have no such case. *H. H.* was a lunatic. She has made no deed, and was under no obligation to do so,—by contract or otherwise. The authority with which her committee was clothed was derived,—not from her,—but from the laws of New York, and the act of her committee derives its whole vitality from the judgment of the court which clothed him with power as such, and upon his petition decreed the sale of real property of the lunatic lying beyond its jurisdiction, and within the limits of this State."

In conclusion, let us call attention to the naked bones of this case, as showing how very far away it is from any margin of a State's rights as regards immovables within its boundaries,—either in fact or in tendency: It is not questioned that Mr. Clarke and his daughter Nancy,—both residents of South Carolina and both regularly before the South Carolina court,—were, in one proportion or another, by virtue of the will of Mrs. Clarke and the subsequent devolution from Julia,—the sole owners in fee of the land in question, as well under Connecticut law as that of South Carolina. Nor is it questioned that, in one way or another, Mr. Clarke and Nancy may voluntarily make a good title to that land without farther concern upon the part of Connecticut than that its forms of conveyance shall be employed. But no form of conveyance has as yet been executed, or even suggested, by any one! Suppose that Mr. Clarke and Nancy were to make use of conveyances

valid in form, in the course of complying with the South Carolina court's advice. Could these be impeached because made in compliance with such advice? And in deraigning title thereunder,—would not the chain run from Mr. Clarke and Nancy directly to their vendees, without reference—we mean of course *necessary* reference—to the decree, or its advice? If so the South Carolina decree has no bearing upon *title*,—even *in futuro*.

In the meanwhile, who is there to hinder the South Carolina court from compelling parties before it, also *residents*, to comply with its orders, if practicable, and constitutional—as there is no question that any here to be apprehended will be. Is it not true that obedience to the commands of a free State by its citizens or residents is one form of their liberty? What third person therefore, whether man or State, could justly interfere betwixt the organs of such a State and persons resident there who have obeyed its constitutional commands even *in invitum*, as the phrase is?

We make these suggestions as indicating that if the States of Connecticut and South Carolina were really parties to the present contention, it might be thought that the former was theoretically the aggressor, rather than the latter. For the former would be questioning the right of the latter directly to compel its residents to sell, *i. e.* "*convert*," certain Connecticut land, which Connecticut had no objection to their doing voluntarily; whilst *per contra* the latter would only be *requiring* action by such residents in a matter about which the former had really no care: except *that it had been* "*required*."

But this is not the case: South Carolina has been modest in her part of the drama; and Connecticut at most is only benevolently lending her name to a little South Carolina girl who *plays* pouting a bit "before company" at the prerogatives of her guardian in the last resort—the court of chancery of her own State.

The purchasers of the land may be trusted that *good titles* will be demanded and had from the owners in fee before the South Carolina court; and the court of South Carolina, on the other hand, that *fair prices* will be obtained.

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For the Plaintiff in Error.

APRIL 4, 1900.